

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

STEWART TITLE GUARANTY COMPANY

PLAINTIFF

VS.

CIVIL ACTION NO. 5:07-CV-199 (DCB) (JMR)

J. ALLEN DERIVAUX, JR.

DEFENDANT

ORDER

This cause is before the Court on the plaintiff's Rule 72 Objection to Chief Magistrate Judge John M. Roper's denial of its motion to compel and request for affirmative relief (**docket entry 84**), and on the defendant's Motion to Strike (**docket entry 103**). Having carefully considered the objection and response, the memoranda and arguments of counsel, as well as the applicable law, and being fully advised in the premises, the Court finds as follows:

Magistrate Judge Roper granted the plaintiff's original motion to compel (docket entry 49) on October 29, 2008, and ordered that all discovery sought in the motion to compel be produced by November 7, 2008. The general discovery deadline was January 2, 2009.

On January 13, 2009, the discovery deadline was extended to June 1, 2009. On March 11, 2009, the plaintiff served the defendant with a notice of deposition, including a Rule 30(b)(5) request for production of documents which the Court had previously ordered the defendant to produce by November 7, 2008. On March 13,

2009, the defendant filed an objection to the notice of deposition and request for production (docket entry 64), and notified plaintiff's counsel that all pertinent documents in the defendant's possession had already been produced, and that there were missing files which the defendant was unable to locate. E-mail from Alex Guidry to Jeff Pierce, March 13, 2009. On April 28, 2009, the deposition of the defendant was taken and no further production of documents was made. On May 20, 2009, plaintiff's counsel wrote to defendant's counsel outlining documents the plaintiff contended should have been produced. Letter of Jeff Pierce to Alex Guidry, May 20, 2009.

On June 1, 2009, the plaintiff filed a Re-Urging of its Motion to Compel and Request for Affirmative Relief (docket entry 80). Magistrate Judge Roper denied the requested relief as untimely since the motion was not filed until June 1, 2009, the date of the discovery deadline. Text Order of June 10, 2009. The plaintiff now seeks modification of Magistrate Judge Roper's Order, and affirmative relief due to the defendant's failure to comply with the discovery requests, including, but not limited to, adverse inferences against the defendant. The Court declines to modify the magistrate judge's order; however, the issue of whether the defendant has withheld documents subject to a motion to compel is not foreclosed. The plaintiff urges that on May 26, 2009, it learned that the defendant brought documents to his deposition but

did not produce them. The record before the Court is inconclusive on this point. The question of whether there has been a failure to produce documents in the defendant's possession subject to an order to compel is a fact issue which must be developed at trial. The court also finds that the defendant's motion to strike the plaintiff's reply to the defendant's response should be denied. Accordingly,

IT IS HEREBY ORDERED that the plaintiff's Rule 72 Objection to Chief Magistrate Judge John M. Roper's denial of its motion to compel and request for affirmative relief (**docket entry 84**) is DENIED WITHOUT PREJUDICE;

FURTHER ORDERED that the defendant's Motion to Strike (**docket entry 103**) is DENIED.

SO ORDERED, this the 28th day of December, 2009.

/s/ David Bramlette
UNITED STATES DISTRICT JUDGE